Supreme Court No. 96354-1
Court of Appeals No. 76758-5-I

IN THE SUPREME COURT FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

A.M.,

Petitioner.

PETITION FOR DISCRETIONARY REVIEW

RICHARD W. LECHICH
Attorney for Petitioner

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 610
Seattle, Washington 98101
(206) 587-2711

TABLE OF CONTENTS

TABLE OF AUTHORITIES

United States Supreme Court

Washington Supreme Court

Court of Appeals

Other Cases

Constitutional Provisions

Statutes

Rules

Other Authorities

A. IDENTITY OF PETITIONER AND DECISION BELOW

A.M., the petitioner, was adjudicated guilty of possessing a controlled substance. The Court of Appeals affirmed. A.M. asks this Court to review the Court of Appeals' decision terminating review.[1]

B. ISSUES

1. Compelled statements violate the privilege against self-incrimination. Drugs were found in a backpack that A.M. used to shoplift. When A.M. was checked in and out of juvenile detention, she was compelled to sign a form stating that this backpack belonged to her. Over A.M.'s objection, the State had this form admitted into evidence and argued that A.M.'s compelled statements proved her guilty of possessing a controlled substance and rebutted her affirmative defense of unwitting possession. Did the admission of A.M.'s compelled statements violate A.M.'s right against self-incrimination?

2. The presumption of innocence is a principle fundamental to America's history and tradition. "Freakish" criminal laws that eliminate traditional *mens rea* elements and shift the burden to defendants to prove their innocence are contrary to this fundamental principle. Washington is

[1] A copy of the unpublished opinion, dated July 30, 2018, and the order denying A.M.'s motion for reconsideration, dated August 21, 2018, are in the appendix.

the only state where possession of a controlled substance is a strict liability crime. The accused is presumed guilty unless he or she can prove "unwitting" possession. Does this presumption of guilt deprive defendants of their liberty without due process of law?

3. This Court has held that the possession of a controlled substance statute has no mental element and is a strict liability crime. But in interpreting the possession statute, this Court did not consider the foregoing constitutional issue, which seriously calls into question the constitutionality of the statute. Statutes are interpreted to avoid constitutional deficiencies. Should this Court overrule its holding that possession of a controlled substance is a strict liability crime without any *mens rea* element?

C. STATEMENT OF THE CASE

A.M., a 15-year-old girl, was detained for trying to shoplift two Halloween costumes from a thrift store. RP 30, 47, 51; Ex. 1; CP 54. A.M.'s companions in the store, another teenage girl and an adult woman, fled and left A.M. RP 26-27, 42-43, 47; Ex. 1. The adult, who was the other teenage girl's mother, appeared to be under the influence of substances. RP 121, Ex. 1.

Following her arrest for theft, a police officer searched the backpack A.M. had used to conceal the costumes. RP 62. Inside a different

compartment of the backpack, the officer found a small bottle containing methamphetamine. RP 62-63. The police arrested A.M. for felony possession of a controlled substance. RP 63-64.

A.M. invoked her right to silence. RP 10-11, 60; CP 51-52. A.M. was booked into juvenile detention. RP 63-64; Ex. 3. A.M.'s "personal property," including the backpack, was sent to the property room. RP 64. A property invoice from the facility recounts that this backpack was among A.M.'s items. Ex. 3. The invoice contains A.M.'s signature, stating that she "read the above accounting of my property and money and find it to be accurate." Ex. 3. Another signature, dated October 25, 2015 and appearing to belong to A.M., states that "I have received the above listed property." Ex. 3.

A.M. was charged not merely with third degree theft—a gross misdemeanor, but also with possession of a controlled substance, methamphetamine—a felony. CP 54. The court held an adjudicatory hearing on the charges on February 14, 2017. A.M. contested only the charge of possession. RP 15-16.

A.M. raised the defense of unwitting possession, which required A.M. to prove that she did not know the methamphetamine was in the backpack. RP 133-34. A.M. testified the backpack was not hers. RP 108. The backpack was from Augustina's house. RP 108. A.M. had not looked

into the small outer pocket of the backpack later found to contain the drugs. RP 108, 111. She did not know there was methamphetamine in the backpack. RP 111.

The other teenage girl at the thrift store with A.M. was her former friend, Augustina. RP 107. The woman at the thrift store was Augustina's mother. RP 107. They went to the store to get Halloween costumes for Augustina's younger brother and sister. RP 107. Augustina's mother did not have money so they tried to steal them. RP 107, 109. A.M. thought Augustina's mother had been under the influence. RP 109.

When A.M. was picked up from the juvenile facility the day after her arrest by her father, the facility gave the backpack to her. RP 110. She took it so that she could return it to Augustina's family, which she did. RP 110.

Over A.M.'s relevance objection, the court admitted the property invoice that was filled out when A.M. was booked in and out of the facility. RP 97-99; Ex. 3. During closing argument, the prosecution cited this evidence, arguing that it showed the backpack belonged to A.M., that it contradicted A.M.'s testimony that the backpack was not hers, and that it was one of the reasons for the court to reject A.M.'s claim of unwitting possession:

> We know that she signed for the backpack, indicated it was her property when she was booked in. We know that she signed for it again when she was released, even though today she has testified that it wasn't her backpack.
>
> . . .
>
> I think for those reasons, the court should find that the respondent has not proved by a preponderance of the evidence that she didn't know that the controlled substance was there.

RP 118-19. The State maintained this position, arguing later that A.M. "couldn't explain why she signed for the backpack as her own when she entered the custody of DJJC." RP 149.

The trial court found A.M. guilty, concluding that A.M. failed to prove the affirmative defense of unwitting possession by a preponderance of the evidence. RP 133-34. A.M. moved for reconsideration, but the court adhered to its ruling. RP 150-51.

On appeal, A.M. argued the admission of her compelled statements was manifest constitutional error in violation of her privilege against self-incrimination. Br. of App. at 19-28; Reply Br. at 6-14. A.M. also argued that the possession statute violated substantive due process if read as a strict liability crime. Br. of App. at 28-37; Reply Br. at 14-19. The Court of Appeals affirmed.

D. ARGUMENT

1. The admission of A.M.'s compelled statement that the backpack containing the drugs was her property violated her privilege against self-incrimination.

a. The admission of A.M.'s compelled statements that a backpack belonged to her violated her constitutional right against self-incrimination.

The federal and state constitutions protect against self-incrimination. U.S. Const. amend. V; Const. art. I, § 9. To secure these constitutional rights, the police must advise suspects in custody of their right to remain silent and the presence of an attorney before interrogation. Miranda v. Arizona, 384 U.S. 436, 445, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). Absent a valid waiver, statements obtained from custodial interrogation are involuntary. State v. Sargent, 111 Wn.2d 641, 648, 762 P.2d 1127 (1988). Their use against a defendant violate the privilege against self-incrimination. Id.

In this case, the admission of A.M.'s compelled statements that the backpack belonged to her violated this constitutional guarantee. Over A.M.'s objection, the court admitted a form that was filled out when A.M. was booked in and out of the facility. RP 97-99; Ex. 3. In the form, A.M. stated that the backpack, earlier found to contain methamphetamine, was her property. Ex. 3.

A.M. invoked her Miranda rights following her arrest. CP 51-52;

RP 10-11, 60-61. She was plainly in custody at the jail. As for "interrogation," the term refers to "any words or actions" that a person "should know are reasonably likely to elicit an incriminating response from the suspect." Rhode Island v. Innis, 446 U.S. 291, 301, 100 S. Ct. 1682, 64 L. Ed. 2d 297 (1980) (emphasis added). Here, asking 15-year-old A.M. if the backpack was her property constituted interrogation because it was reasonably likely to elicit an incriminating response. State v. Denney, 152 Wn. App. 665, 667-68, 673, 218 P.3d 633 (2009) (standard questionnaire administered by jail about drug use constituted interrogation); State v. Harms, 137 Idaho 891, 55 P.3d 884, 886-88 (Ct. App. 2002) ("interrogation" to request that defendant, who was facing unlawful possession of firearm charges, sign property invoice that listed firearms removed from home); see J.D.B. v. North Carolina, 564 U.S. 261, 277 n.8, 131 S. Ct. 2394, 180 L. Ed. 2d 310 (2011) (when engaging in the objective inquiry required by Miranda, a child's age is a relevant consideration).

Regardless of Miranda, the record shows the statements were involuntary because they were compelled. See State v. DeLeon, 185 Wn.2d 478, 487, 374 P.3d 95 (2016) (questions to detainees at booking about gang affiliation compelled; no discussion of Miranda). Children entering the facility are required to make a statement about whether the

items with them are their property. RP 89-90, 94, 96. Given these circumstances, any statement elicited from a youth about her "property" (including a refusal to say) is compelled and involuntary. See DeLeon, 185 Wn.2d at 487.

b. In refusing to review the foregoing manifest constitutional error, the Court of Appeals departed from this Court's precedent on RAP 2.5(a)(3).

The Court of Appeals did not disagree with the foregoing legal analysis. Rather, the court refused to review the error, ruling it was not properly before the court for the first time on appeal as manifest constitutional error. RAP 2.5(a)(3). The court reasoned that the error was not "manifest" because A.M. "cannot prove prejudice." Slip. op. at 7. As explained below, the court's analysis is directly contrary to this Court's recent precedents on RAP 2.5(a)(3) and warrants this Court's review.

Manifest error affecting a constitutional right may be raised for the first time on appeal as a matter of right. RAP 2.5(a)(3); State v. Blazina, 182 Wn.2d 827, 833, 344 P.3d 680 (2015). In analyzing a claim of manifest constitutional error, the appellate court asks: (1) is the error of constitutional magnitude, and (2) is the error manifest? State v. Kalebaugh, 183 Wn.2d 578, 583, 355 P.3d 253 (2015).

As argued in A.M.'s briefing, the RAP 2.5(a)(3) criteria was satisfied. Br. of App. at 25-27; Reply Br. at 11-13. Because the State

believed A.M.'s compelled statement about the backpack belonging to her was incriminating, the State sought the admission of a jail inventory form containing her statement. The trial court overruled A.M.'s relevance objection. RP 97-99. The form containing A.M.'s statement is in the record along with testimony explaining how property invoices at the jail are created. Ex. 3; RP 89-94. As shown by the court's ruling granting A.M.'s motion in limine, A.M. invoked her Fifth Amendment right to remain silent. CP 51; RP 10-11. This record is adequate to review the asserted error. And the trial court could have corrected the error given A.M.'s objection to the evidence and the order granting A.M.'s pretrial motion in limine.

Still, the Court of Appeals refused to review the error on the theory that A.M. had not proved prejudice in light of an oral remark by the trial court that the evidence related to the backpack was not a significant factor in its decision. Slip. op. at 7-8.

As A.M. pointed out in her motion to reconsider, the court's analysis was wrong and contrary to this Court's most recent precedents on RAP 2.5(a)(3). As explained by this Court, RAP 2.5(a)(3) is a "gatekeeping" rule that "should not be confused with" whether there is a "lack of prejudice":

The requirements under RAP 2.5(a)(3) should not be

> confused with the requirements for establishing an actual violation of a constitutional right or for establishing lack of prejudice under a harmless error analysis if a violation of a constitutional right has occurred. The purpose of the rule is different; RAP 2.5(a)(3) serves a gatekeeping function that will bar review of claimed constitutional errors to which no exception was made unless the record shows that there is a fairly strong likelihood that serious constitutional error occurred.

State v. Lamar, 180 Wn.2d 576, 583, 327 P.3d 46 (2014) (emphasis added). The determination of whether the error is harmless or prejudicial "is a separate inquiry." Kalebaugh, 183 Wn.2d at 585. Once RAP 2.5(a)(3) is satisfied, the appellate court then reviews the claimed error on the merits as if it had been preserved and, if there was error, engages in the traditional "prejudice" or "harmless error" analysis. Lamar, 180 Wn.2d at 586, 588; Kalebaugh, 183 Wn.2d at 584-85.

The Court of Appeals flatly disregarded this framework, instead placing the burden on A.M. to "prove prejudice." Slip. op at 7. Moreover, the trial court's oral comment that the evidence about the backpack not being a "big factor" in the trial court's decision does not prove lack of prejudice. It was a close case, with the court assuring A.M. personally that the court was not finding that she was dishonest in her testimony, only that she had not met her burden. RP 150, 157-58. Moreover, the court's oral comment was not incorporated into its findings. See State v. Head, 136 Wn.2d 619, 622, 964 P.2d 1187 (1998). And the court's comment shows

the tainted evidence was still a factor in its decision. It cannot be concluded that A.M.'s compelled statement did not contribute to the trial court's decision to reject A.M.'s defense of unwitting possession.

c. Review is warranted to resolve a significant constitutional question and to provide clarity on what constitutes manifest constitutional error.

Notwithstanding A.M.'s briefing and her motion for reconsideration, the Court of Appeals refused to follow this Court's decisions in Lamar and Kalebaugh setting out the appropriate RAP 2.5(a)(3) framework. Instead the court improperly placed the burden on A.M. to prove the error prejudicial. The Court of Appeals' decision is in conflict with this Court's precedent, meriting review. RAP 13.4(b)(1). Granting review will give the Court the opportunity to reiterate that it meant what it said in Lamar and Kalebaugh regarding RAP 2.5(a)(3) claims. Alternatively, because the Court of Appeals' error is obvious, this Court should simply vacate the Court of Appeals' decision and remand with instruction to apply Lamar and Kalebaugh.

As to the merits, this case presents a significant constitutional question worthy of this Court's consideration. RAP 13.4(b)(3). Whether property invoice forms at jails can be properly admitted without violating a defendant's constitutional right against self-incrimination is an important issue that this Court should resolve. The issue is also likely to recur,

further warranting this Court's review as a matter of substantial public interest. RAP 13.4(b)(4).

2. Unless interpreted to not be a strict liability offense, the offense of felony possession of a controlled substance violates due process.

a. The presumption of innocence is fundamental and strict liability crimes are highly disfavored.

"The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law." Coffin v. United States, 156 U.S. 432, 453, 15 S. Ct. 394 (1895). Relatedly, it is fundamental that "wrongdoing must be conscious to be criminal." Morissette v. United States, 342 U.S. 246, 252, 72 S. Ct. 240, 96 L. Ed. 288 (1952). For these reasons, even where a statute appears to not contain any mental element, this does not mean there is not any. Elonis v. United States, __ U.S. __, 135 S. Ct. 2001, 2009, 192 L. Ed. 2d 1 (2015). Unless it can be absolutely shown that a legislature intended to exclude a traditional mental element, the courts will imply one. See, e.g., State v. Anderson, 141 Wn.2d 357, 366-67, 5 P.3d 1247 (2000). This makes sense because otherwise innocent conduct may be criminalized.

Notwithstanding the foregoing principles, this Court has held that drug possession is a strict liability crime with no mental element. State v.

Bradshaw, 152 Wn.2d 528, 537, 98 P.3d 1190 (2004); State v. Cleppe, 96 Wn.2d 373, 635 P.2d 435 (1981). The State need only prove the nature of the substance and the fact of possession. Bradshaw, 152 Wn.2d at 537-38. For the innocent to avoid conviction, they bear the burden of proving, by a preponderance of the evidence, that their possession was unwitting. Id. at 538. In other words, instead of a presumption of innocence, there is a presumption of guilt.

b. If interpreted to have no mental element and to be a strict liability crime, the drug possession statute is unconstitutional.

As argued in the Court of Appeals, this burden shifting scheme deprives persons of their liberty without due process of law. A state has authority to allocate the burdens of proof and persuasion for a criminal offense, but this allocation violates due process if "it offends some principle of justice so rooted in the traditions and conscience of our people to be ranked as fundamental." Patterson v. New York, 432 U.S. 197, 202, 97 S. Ct. 2319, 53 L. Ed. 2d 281 (1977) (internal quotation omitted). "The presumption of innocence unquestionably fits that bill." Nelson v. Colorado, __ U.S. __, 137 S. Ct. 1249, 1256 n.9, 197 L. Ed. 2d 611 (2017). For this reason, "there are obviously constitutional limits beyond which the States may not go . . ." Patterson, 432 U.S. at 210.

History and tradition provide guidance on when the constitutional

line is crossed:

> Where a State's particular way of defining a crime has a long history, or is in widespread use, it is unlikely that a defendant will be able to demonstrate that the State has shifted the burden of proof as to what is an inherent element of the offense, or has defined as a single crime multiple offenses that are inherently separate. Conversely, a freakish definition of the elements of a crime that finds no analogue in history or in the criminal law of other jurisdictions will lighten the defendant's burden.

Schad v. Arizona, 501 U.S. 624, 640, 111 S. Ct. 2491, 115 L. Ed. 2d 555 (1991) (plurality); see Schad, 501 U.S. 650 (Scalia, J. concurring) ("It is precisely the historical practices that *define* what is "due.") .

Washington appears to be the *only* state that makes drug possession a true strict liability crime.[2] State v. Adkins, 96 So. 3d 412, 424 n.1 (Fla. 2012) (Pariente, J., concurring); see Bradshaw, 152 Wn.2d at 534; Dawkins v. State, 313 Md. 638, 547 A.2d 1041, 1045 n.7 (1988). Although Florida eliminated a *mens rea* requirement from its drug possession statute, this only eliminated the State's burden to prove that the defendant knew *the nature* of the substance. Adkins, 96 So. 3d at 415-16. It did not eliminate the requirement that the State prove defendants knew they possessed the substance. Id. Unlike in Washington, the State in

[2] North Dakota had made drug possession a strict liability offense, but the legislature changed the law to require a mental element. State v. Bell, 649 N.W.2d 243, 252 (2002).

Florida must at least prove that the defendant was aware of the presence of the substance.

That nearly every drug possession offense in this country has a *mens rea* requirement is unsurprising. As acknowledged in Bradshaw, the Uniform Controlled Substances Act of 1970 has a "knowingly or intentionally" requirement for the crime of possession. Unif. Controlled Substances Act 1970 § 401(c); Bradshaw, 152 Wn.2d at 534. This shows that the offense of possession of a controlled substance has traditionally required proof of knowledge.

Washington's drug possession law is truly "freakish." Schad, 501 U.S. 640 (plurality). It is contrary to the practice of every other state. It is contrary to the tradition, as shown by the model act, of requiring the State prove a *mens rea* element in drug possession crimes. This is a strong indication that Washington's possession statute violates due process. Id.

A recent federal district court decision addressing the constitutionality of an Arizona law is instructive. May v. Ryan, 245 F. Supp. 3d 1145 (D. Ariz. 2017). There, the court held that Arizona's child molestation law violated a defendant's right to due process. Id. at 1162-65. Arizona had eliminated the requirement that the State prove sexual motivation, effectively criminalizing broad swaths of innocent conduct (such as changing a baby's diaper). Id. at 1155-56. Defendants could avoid

conviction if they affirmatively proved, by a preponderance of the evidence, that their touching lacked sexual motivation. Id. at 1156.

The federal court ruled this violated due process. The court recognized that due process limits states in placing burdens on defendants. Id. at 1157-58. The Arizona law unconstitutionally shifted the burden of proof to defendants to prove their innocence. Id. at 1158-59. The court recognized that proof of sexual intent had traditionally been part of the offense of child molestation. Id. at 1159-61. Arizona's law was "freakish." Id. at 1161-62.

The court recognized that "[s]hifting what used to be an element to a defense is not fatal if what remains of the stripped-down crime still may be criminalized and is reasonably what the state set out to punish," but that was not true for the Arizona offense. Id. at 1163. Formulized,

> If the 'affirmative' defense is to disprove a positive—and that positive is the only wrongful quality about the conduct as a whole—it is a nearly conclusive sign that the state is unconstitutionally shifting the burden of proof for an essential element of a crime.

Id. at 1164.

Similarly, when a person possesses a controlled substance without knowledge, there is nothing wrong about their conduct. For example, if a person rents or buys a car, and drugs are hidden inside, there is nothing blameworthy about the person's conduct. The same is true if a person

borrows a backpack and, unknown to that person, there are drugs inside. Stripped of the traditional mental element of knowledge, there is no "wrongful quality" about the person's conduct in possessing drugs. To conclude otherwise criminalizes the innocent behavior of possessing property. Like the child molestation statute at issue in May, Washington's possession statute is unconstitutional.

In rejecting A.M.'s argument, the Court of Appeals simply cited State v. Schmeling, 191 Wn. App. 795, 801-02, 365 P.3d 202 (2015). The Schmeling court rejected a similar argument in light of this Court's opinion in Bradshaw. Id. But Bradshaw did not address this issue. Rather, Bradshaw rejected a vagueness argument because petitioners offered little analysis in support of their argument. 152 Wn.2d at 539. A.M.'s argument did not concern vagueness and her argument was adequately briefed. Bradshaw was not controlling and the Court of Appeal erred in concluding that it controlled the issue. In re Stockwell, 179 Wn.2d 588, 600, 316 P.3d 1007 (2014).[3]

[3] "Where the literal words of a court opinion appear to control an issue, but where the court did not in fact address or consider the issue, the ruling is not dispositive and may be reexamined without violating stare decisis in the same court or without violating an intermediate appellate court's duty to accept the rulings of the Supreme Court." (internal quotation omitted).

c. To avoid the foregoing constitutional deficiency, the drug possession statute should be read to contain a mental element.

This Court construes criminal statutes to avoid constitutional deficiencies. State v. Eaton, 168 Wn.2d 476, 480, 229 P.3d 704, 706 (2010). Because interpreting the possession statute as a strict liability crime raises grave constitutional concerns about the validity of the statute, this Court should grant review and overrule its decisions holding that possession is a strict liability crime.

This Court interpreted the possession statute to have no *mens rea* in Bradshaw and Cleppe. This result is wrong. In reaching that result, the Cleppe court relied on the fact the legislature appeared to have omitted a mental element from the statute. Cleppe, 96 Wn.2d at 379-80. But this is not the appropriate analysis. United States v. United States Gypsum Co., 438 U.S. 422, 438, 98 S. Ct. 2864, 57 L.Ed.2d 854 (1978) ("Certainly far more than the simple omission of the appropriate phrase from the statutory definition is necessary to justify dispensing with an intent requirement."); State v. Anderson, 141 Wn.2d 357, 361, 5 P.3d 1247 (2000) ("failure to be explicit regarding a mental element is not, however, dispositive of legislative intent.").

As stated earlier, Washington is the only jurisdiction with strict liability for simple drug possession. It is a felony with a maximum

punishment of five years imprisonment. RCW 69.50.4013(2); RCW 9A.20.021(1)(c).

It is also not a public welfare type offense where the lack of a mental element is generally permitted. For example, in Balint, the United States Supreme Court upheld a narcotics law that did not require the defendant know the item he was selling qualified as an unlawful narcotic within the meaning of the statute. See United States v. Balint, 258 U.S. 250, 254, 42 S. Ct. 301, 66 L. Ed. 604 (1922); United States v. Staples, 511 U.S. 600, 606, 132 S. Ct. 593, 181 L. Ed. 2d 435 (2011). This was a kind of public welfare offense where the activity is highly regulated. Staples, 511 U.S. at 606-07. Moreover, "[e]ven statutes creating public welfare offenses generally require proof that the defendant had knowledge of sufficient facts to alert him to the probability of regulation of his potentially dangerous conduct." Posters 'N' Things, Ltd. v. United States, 511 U.S. 513, 522, 114 S. Ct. 1747, 128 L. Ed. 2d 539 (1994).

"By interpreting such public welfare offenses to require at least that the defendant know that he is dealing with some dangerous or deleterious substance, [the United States Supreme Court has] avoided construing criminal statutes to impose a rigorous form of strict liability." Staples, 511 U.S. at 607 n.3. In contrast, Washington's possession law as interpreted in Bradshaw and Cleppe does not require any kind of

knowledge by the defendant. Unlike the offense in Balint, it is a rigorous form of strict liability.

d. Review should be granted to reexamine the elements of the possession statute and its constitutionality.

Whether the drug possession statute violates due process presents a significant constitutional question worthy of this Court's review. RAP 13.4(b)(3). It is an issue that will continue to recur and is therefore a matter of public interest. RAP 13.4(b)(4). Similarly, whether the drug possession statute should be read to criminalize innocent behavior is an issue of substantial public interest. RAP 13.4(b)(4). This Court should grant review.

E. CONCLUSION

For the foregoing reasons, A.M. respectfully requests this Court grant the petition for discretionary review.

Respectfully submitted this 20th day of September, 2018.

/s Richard W. Lechich
Richard W. Lechich – WSBA #43296
Washington Appellate Project (#91052)
Attorneys for Petitioner

Appendix

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. A.M., a minor, Appellant.	No. 76758-5-I DIVISION ONE UNPUBLISHED OPINION FILED: July 30, 2018

LEACH, J. — A.M.[1] appeals her conviction for possession of a controlled substance for possession of methamphetamine. She challenges the sufficiency of the evidence supporting the trial court's conclusion that she did not prove the affirmative defense of unwitting possession. She also claims manifest constitutional error on the ground that the trial court admitted her compelled statement that the backpack containing the methamphetamine was her property. And she contends that the offense of possession of a controlled substance violates due process.

The fact that A.M. was the only person observed touching or handling the backpack, in addition to the trial court's other findings, supports the court's conclusion that A.M. did not prove unwitting possession. Because A.M. does not

[1] The court grants A.M.'s motion to change the caption and use her initials in the opinion. The court denies the balance of her motion.

show that admitting her allegedly compelled statement prejudiced her and our Supreme Court has affirmed the legislature's authority to make possession a strict liability offense, A.M. does not show manifest constitutional error or a due process violation. We affirm.

BACKGROUND

On October 24, 2015, Kent Caldwell, loss prevention manager at Goodwill, became suspicious of two juvenile females and one adult female who were shopping together in the store. He saw the adult female put two Halloween costumes into a shopping cart. Then he saw a juvenile, later identified as A.M., remove the costumes from their hangers and put them in the large pocket of a backpack that was in the cart. He testified that as the women moved toward the front door and abandoned the shopping cart, A.M. put on the backpack and exited the store. Caldwell detained her outside of the store.

Police Officer Rodney Wolfington arrested A.M. and then searched the backpack. In a small compartment of the backpack he found a medicine bottle with methamphetamine in it. The State charged A.M. with possession of a controlled substance and third degree theft. After a bench trial, the trial court found A.M. guilty as charged. A.M. appeals her conviction for possession of a controlled substance.

ANALYSIS

Unwitting Possession

A.M. challenges the trial court's decision that she did not prove an unwitting possession defense by a preponderance of the evidence. We affirm the trial court.

This court reviews de novo whether the trial court's findings of fact support its conclusions of law.[2] We treat unchallenged findings of fact as true on appeal.[3] And we review whether substantial evidence supports the trial court's challenged factual findings,[4] viewing the record in the light most favorable to the prevailing party—in this case, the State.[5] "Substantial evidence exists where there is a sufficient quantity of evidence in the record to persuade a fair-minded, rational person of the truth of the finding."[6] In the absence of a finding on a factual issue, a reviewing court presumes that the party with the burden of proof failed to sustain her burden.[7]

Possession of a controlled substance[8] is a strict liability crime, which means a crime without an intent requirement.[9] The State must prove the nature of the

---

[2] Dep't of Labor & Indus. v. Shirley, 171 Wn. App. 870, 879, 288 P.3d 390 (2012).

[3] Shirley, 171 Wn. App. at 879.

[4] State v. Hill, 123 Wn.2d 641, 644, 870 P.2d 313 (1994).

[5] Harrison Mem'l Hosp. v. Gagnon, 110 Wn. App. 475, 485, 40 P.3d 1221 (2002).

[6] Hill, 123 Wn.2d at 644.

[7] State v. Beaver, 184 Wn. App. 235, 251, 336 P.3d 654 (2014) (explaining that because the defendant had the burden to prove that he had regained his sanity and the trial court did not make any findings about his mental health, he bore the consequences of failing to obtain such a finding), aff'd, 184 Wn.2d 321, 358 P.3d 385 (2015).

[8] RCW 69.50.4013.

[9] State v. Bradshaw, 152 Wn.2d 528, 537-38, 98 P.3d 1190 (2004).

substance and the fact of possession but not that the defendant knowingly possessed the substance.[10] To avoid criminal liability, the defendant can prove, by a preponderance of the evidence, the affirmative defense of unwitting possession.[11]

Here, the trial court stated in its conclusions of law, "[A.M.] has not proven unwitting possession by a preponderance of the evidence." Because the trial court did not make a factual finding that A.M. persuaded the court of her unwitting possession, we presume, consistent with the trial court's conclusion of law, that A.M. failed to meet her burden. Because we are reviewing whether the absence of a finding that A.M. proved unwitting possession supports the court's conclusion that A.M. did not meet her burden, we review A.M.'s failure to meet her burden as we would a challenged finding of fact. We must therefore determine whether, considering the evidence in the light most favorable to the State, a rational trier of fact could have found that A.M. failed to prove the defense of unwitting possession by a preponderance of the evidence.

A.M. asserts that because the trial court's findings are unrelated to the issue of unwitting possession and the court did not find that she lied when testifying, the evidence requires the conclusion that she proved unwitting possession by a preponderance of the evidence. The trial court made these findings:

1. The incidents in the case at bar occurred on October 24, 2016, in Snohomish County, Washington.
2. The respondent was in Goodwill with two other persons.

---

[10] Bradshaw, 152 Wn.2d at 537-38.
[11] Bradshaw, 152 Wn.2d at 531, 538.

3. The respondent pushed the shopping cart containing a blue backpack while in the store.
4. The respondent concealed Goodwill merchandise into the blue backpack.
5. The respondent put the backpack on her back and left the store with concealed merchandise, passing all points of sale.
6. Methamphetamine was recovered from the backpack, as was the stolen Goodwill merchandise.
7. No one else was observed touching or handling the backpack.
8. Respondent's possession of the controlled substance was both actual and constructive.

A.M. challenges only the first finding of fact. Although the trial court found that the incidents at issue occurred on October 24, 2016, the record shows that they occurred on October 24, 2015. A.M. does not challenge the remaining findings, so we treat them as true.

"[C]redibility determinations are solely for the trier of fact [and] cannot be reviewed on appeal."[12] The trial court did not include in its findings A.M.'s testimony supporting her defense. Although the trial judge stated that she did not believe that A.M. perjured herself, she explained that she and A.M. had a "difference [of] opinion as to what happened." The trial judge stated that she weighed most heavily in making her determination the facts that A.M. "was the only person that was putting items in the backpack, . . . was the one that walked out with the backpack[, and] was the only one that was possessing the backpack."

Although A.M. testified that the backpack came from her friend's house, that she returned the backpack to her friend's house after she was released from detention, and that she did not know that the methamphetamine was in the backpack, the court concluded that A.M. did not meet her burden. The court clearly

[12] Morse v. Antonellis, 149 Wn.2d 572, 574, 70 P.3d 125 (2003).

made a credibility determination and found A.M.'s testimony, the primary evidence supporting her defense, insufficient to prove unwitting possession. As the court stated in its findings, A.M. pushed the cart, put the costumes into the backpack, left the store with the backpack, and was the only person observed touching or handling the backpack. From this evidence, a rational trier of fact could have found that A.M. did not meet her burden.

Right against Self-Incrimination

Next, A.M. claims that the court violated her federal and state constitutional rights against self-incrimination by admitting her compelled statement that the backpack was her property.[13] We disagree.

First, A.M. did not preserve the issue for appeal. Normally, a party may appeal an evidence decision only on the specific ground the objection made at trial.[14] But a party may raise for the first time on appeal a manifest error affecting a constitutional right.[15] Here, although A.M.'s trial counsel objected based on relevance, he did not argue a Fifth Amendment violation. On appeal, A.M. claims manifest constitutional error.

When a party claims manifest constitutional error, we preview the issue to determine whether there is both error and prejudice. If not, we do not review the claim. A showing of prejudice requires that the defendant establish that the

---

[13] The Fifth Amendment to the United States Constitution states, "No person shall . . . be compelled in any criminal case to be a witness against himself." Article 1, section 9 of the Washington Constitution states, "No person shall be compelled in any criminal case to give evidence against himself."

[14] State v. Guloy, 104 Wn.2d 412, 422, 705 P.2d 1182 (1985).

[15] RAP 2.5(a)(3); State v. Walsh, 143 Wn.2d 1, 7, 17 P.3d 591 (2001).

asserted error had practical and identifiable consequences in the trial.[16] Here, because we conclude that the alleged error caused no prejudice, we do not review the claim.

Ashley Thomas, a juvenile court supervisor at the Denny Juvenile Detention Center, testified that as part of the intake process, juveniles review with staff and sign a property sheet listing the items they brought in to ensure that they leave with those same items. The statement above the signature line on the property sheet reads, "I have read the above accounting of my property and money and find it to be accurate. I realize that property not claimed within 30 days will be subject to disposal." A.M.'s signed property sheet listed the items that A.M. arrived with, including the backpack that had contained the methamphetamine. A.M. claims that the admission of her statement that the backpack belonged to her violated her right against self-incrimination and caused prejudice because the State used her statement to argue that she had effectively confessed to owning the backpack.

But even if admission of A.M.'s statement violated her Fifth Amendment right against self-incrimination, she cannot prove prejudice. In its closing, the State reasoned, "We know that she signed for the backpack, indicated it was her property when she was booked in. We know that she signed for it again when she was released, even though today she has testified that it wasn't her backpack." The trial court responded, "Quite frankly, whether [A.M.] removed the backpack or whether the backpack went with her from detention really was not a big factor in

---

[16] State v. Kirkman, 159 Wn.2d 918, 935, 155 P.3d 125 (2007).

my case." A.M. asserts that this statement means the evidence related to booking was still a factor in the trial court's decision.

Even so, the trial court did not include this evidence in its findings to support its conclusion that A.M. did not prove unwitting possession. In addition, other evidence included in the court's findings, like the fact that A.M. was the only person observed touching or handling the backpack, shows that the court relied on other evidence in determining A.M.'s guilt. Because the trial court did not rely on the evidence related to booking, A.M. cannot prove that it had identifiable consequences at trial. She did not show manifest constitutional error, so we decline to review the claim.

Due Process

Last, A.M. claims that Washington's possession of a controlled substance statute, RCW 69.50.4013, violates due process because the affirmative defense of unwitting possession shifts the burden of proof to the defendant. This contradicts settled authority. We review constitutional issues de novo.[17]

The Fourteenth Amendment to the United States Constitution prohibits a State from depriving a person of liberty without due process of law. Due process requires the State to prove every element of the charged offense to overcome the presumption of innocence in favor of the accused.[18] As discussed above, possession of a controlled substance is a strict liability crime.[19] The State must

[17] Bradshaw, 152 Wn.2d at 531.
[18] In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970).
[19] Bradshaw, 152 Wn.2d at 532.

prove the nature of the substance and the fact of possession.[20] A defendant can avoid conviction by proving unwitting possession by a preponderance of the evidence.[21] A.M. contends that this shifts the burden of proof and deprives defendants of their liberty without due process.

In allocating burdens of proof in a criminal case, "there are obviously constitutional limits beyond which the States may not go."[22] A.M. relies on Schad v. Arizona[23] to provide guidance about how to determine when a State exceeds its discretion in defining an offense:

> Where a State's particular way of defining a crime has a long history, or is in widespread use, it is unlikely that a defendant will be able to demonstrate that the State has shifted the burden of proof as to what is an inherent element of the offense, or has defined as a single crime multiple offenses that are inherently separate. Conversely, a freakish definition of the elements of a crime that finds no analogue in history or in the criminal law of other jurisdictions will lighten the defendant's burden.

Our Supreme Court has held that the legislature has the authority to create a strict liability crime.[24] In State v. Bradshaw[25] and State v. Cleppe,[26] the court determined that based on the language and legislative history of the possession statute, the legislature clearly intended to make possession of a controlled

---

[20] Bradshaw, 152 Wn.2d at 538; RCW 69.50.4013.

[21] Bradshaw, 152 Wn.2d at 531, 533-34.

[22] Patterson v. New York, 432 U.S. 197, 225, 97 S. Ct. 2319, 53 L. Ed. 2d 281 (1977).

[23] 501 U.S. 624, 640, 111 S. Ct. 2491, 115 L. Ed. 2d 555 (1991) (footnote omitted).

[24] Bradshaw, 152 Wn.2d at 532.

[25] 152 Wn.2d 528, 531, 532-34, 539, 98 P.3d 1190 (2004) (rejecting defendants' due process challenge to the possession statute because they did not adequately brief the issue).

[26] 96 Wn.2d 373, 380-81, 635 P.2d 435 (1981).

substance a strict liability crime.[27] "In the 22 years since Cleppe, the legislature has not added a mens rea element."[28] The court explained that because mere possession does not have an inferred knowledge requirement, the affirmative defense of unwitting possession does not shift the burden of proving a mens rea element to the defendant.[29] Instead, it "ameliorates the harshness of a strict liability crime."[30] And the State must still meet its burden of proving the elements of the offense beyond a reasonable doubt.[31] As Schad reasons, when a State has a long history of defining a crime, as does Washington with possession of a controlled substance, it is "unlikely" that the defendant will be able show that the State has shifted the burden of proof.[32]

In State v. Schmeling,[33] Division Two of this court recently rejected a due process challenge to the possession statute based on our Supreme Court's reasoning in Bradshaw. Schmeling reasoned that because the Washington Supreme Court has repeatedly approved of the legislature's authority to adopt strict liability crimes and expressly stated that the possession statute contains no mens rea requirement, the possession statute does not violate due process.[34] We follow this reasoning and reject A.M.'s due process challenge.

---

[27] Bradshaw, 152 Wn.2d at 537.
[28] Bradshaw, 152 Wn.2d at 539.
[29] Bradshaw, 152 Wn.2d at 538.
[30] Bradshaw, 152 Wn.2d at 538.
[31] Bradshaw, 152 Wn.2d at 538.
[32] Schad, 501 U.S. at 640.
[33] 191 Wn. App. 795, 802, 365 P.3d 202 (2015).
[34] Schmeling, 191 Wn. App. at 802.

CONCLUSION

Substantial evidence supports the trial court's conclusion that A.M. did not prove unwitting possession by a preponderance. A.M. cannot prove that her alleged compelled statement constituted manifest constitutional error or that the possession statute shifts the burden in violation of due process. We affirm.

Leach, J.

WE CONCUR:

Schindler, J.

Becker, J.

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. A.M., a minor, Appellant.	No. 76758-5-I DIVISION ONE ORDER DENYING MOTION FOR RECONSIDERATION

The appellant having filed a motion for reconsideration herein, and a majority of the panel having determined that the motion should be denied; now, therefore, it is hereby

ORDERED that the motion for reconsideration be, and the same is, hereby denied.

FOR THE COURT:

Leach, J.
Judge

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 76758-5-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

☒ respondent J. Scott Halloran
[shalloran@co.snohomish.wa.us]
[Diane.Kremenich@co.snohomish.wa.us]
Snohomish County Prosecuting Attorney

☒ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Legal Assistant
2018 Washington Appellate Project

Date: September 20,

WASHINGTON APPELLATE PROJECT

September 20, 2018 - 4:50 PM

Transmittal Information

Filed with Court:	Court of Appeals Division I
Appellate Court Case Number:	76758-5
Appellate Court Case Title:	Access to case information is limited
Superior Court Case Number:	16-8-01007-5

The following documents have been uploaded:

- 767585_Petition_for_Review_20180920164906D1995871_7652.pdf
  This File Contains:
  Petition for Review
  The Original File Name was washapp.092018-14.pdf

A copy of the uploaded files will be sent to:

- diane.kremenich@snoco.org
- shalloran@co.snohomish.wa.us

Comments:

Sender Name: MARIA RILEY - Email: maria@washapp.org
Filing on Behalf of: Richard Wayne Lechich - Email: richard@washapp.org (Alternate Email: wapofficemail@washapp.org)

Address:
1511 3RD AVE STE 701
SEATTLE, WA, 98101
Phone: (206) 587-2711

Note: The Filing Id is 20180920164906D1995871